No. 99-651

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

KIM D. FIORIGLIO,

Petitioner,

v.

CITY OF ATLANTIC CITY, JAMES WHELAN, PAUL GALLAGHER, BENJAMIN BRENNER, TERRENCE MOONEY, DENNIS BROOKS, ATLANTIC CITY FIREFIGHTERS LOCAL 198, JOSEPH RUSH, JOHN DOE(S) 1-50, fictitious names(s) as individuals, and ABC CORPORATION(S) 1-50, fictitious names(s) as corporations and/or entities, i/j/s/a,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF ATLANTIC CITY

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QUESTION PRESENTED FOR REVIEW

Whether the Third Circuit Court of Appeals was incorrect as a matter of law in affirming the lower court's determination that the evidence submitted by the Petitioner did not support his claims of political discrimination under 42 U.S.C. § 1983?

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OPINIONS BELOW

In addition to the Opinions and Orders listed in the petition (Pet. 1), the Opinions of the United States District Court for the District of New Jersey dated April 8, 1998, denying Petitioner's Motion for Relief from Judgment under Rule 60(b) of the Federal Rules of Civil Procedure, and dated August 13, 1998, denying Petitioner's Motion to expand the record for purposes of appeal pursuant to Rule 10(e) of the Federal Rules of Civil Procedure, are unreported. In addition, by Order dated June 2, 1999 the United States Court of Appeals for the Third Circuit denied the Petitioner's Motion to expand the record.

STATEMENT OF JURISDICTION

Respondent, City of Atlantic City ("City"), does not contest the Court's jurisdiction pursuant to 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Petitioner's meritless assertions that the standard for the burden of proof in a First Amendment political discrimination claim needs to be clarified provides no cause for this Court's review. Nowhere in the record has there been any statement by the District Court or the Third Circuit that these lower courts were unsure how to weigh evidence in political discrimination cases verses other employment discrimination cases. In addition, the petition does not cite to any authority that expresses any reservation or concern regarding the applicable burden of proof standard in First Amendment political discrimination matters. This contrived "uncertainty" asserted by the Petitioner does not provide any compelling reason to grant the petition.

A. The petition contains misstatements and misrepresents the determinations made by the District Court.

The Petitioner grossly distorts the record below and makes baseless assertions without appropriate citation to the record.

Initially, the Petitioner asserts that during the 1994 campaign for Mayor, the Petitioner revealed damaging facts regarding the Mayor. (Pet. 3). While the Petitioner may have made comments about the Mayor during the campaign, there was no evidence presented to the lower courts evidencing that the Petitioner revealed damaging facts regarding the Mayor. The Petitioner also inaccurately states that there was limited discovery allowed against "the city officials". (Pet. 5). There is no indication in the record below that discovery was in anyway limited. It was not until after the Petitioner's complaint had been dismissed by the District Court, and the Petitioner's Motion for Relief under Fed. R. Civ. P. 60(b) was denied by the District Court, that Petitioner filed a Motion to expand the record on appeal with the District Court. That Motion was denied by the District Court and that denial was affirmed by the Third Circuit. The Petitioner has improperly insinuated that in someway his case was prejudiced insofar as he was afforded "limited discovery." This is a baseless assertion and a statement that finds no support in the record, which is apparent by the Petitioner's lack of any citation.

Petitioner also inaccurately and without any citation asserts that he had "demonstrated the continuous comments the city officials made against him and how they changed local rules in order to prevent him from being promoted to fire battalion chief." (Pet. 5). The Petitioner fails to identify

what comments were made by what city officials. In addition, the Petitioner also fails to indicate that three unsworn and unsigned taped statements that the Petitioner submitted in opposition to the summary judgment motions below, failed to meet the requirements of Fed. R. Civ. P. 56(e) and were not considered by the lower courts in conjunction with the summary judgment motions.[1]

B. The record does not support a conclusion that politics caused others to be promoted over the Petitioner.

Petitioner's disingenuous assertion that city officials "changed local rules in order to prevent him from being promoted to fire battalion chief" (Pet. 5) ignores the following findings in the District Court's March 5, 1998 decision:

> Furthermore, plaintiff admits that the newly adopted promotion criteria, disciplinary history, education, sick leave, residency and raw score, are appropriate considerations in deciding whom to promote. He then acknowledges that he would not rank highly on some of these admittedly appropriate criteria. He admits that he has had disciplinary problems in the past. He also does not dispute that the other two candidates who were being considered for promotion have better educational backgrounds than he does. (Pet. App. 23a).

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1. Footnote #2 of the District Court's April 8, 1998 Opinion denying Petitioner's motion for relief from judgment under Fed. R. Civ. P. 60(b) stated that even if the court were to consider the statements, the court would still conclude that Petitioner's evidence could not support his claim under 42 U.S.C. § 1983.

> Plaintiff simply cannot maintain a claim of civil conspiracy in violation of sec. 1983 on the unsubstantiated theory that defendants conspired against him in the process of formulating the new promotional criteria. He has presented this Court with no proof of improper conduct by the defendants upon which a jury could base a finding in his favor. The Mayor adopted rational promotion criteria, pursuant to N.J.A.C. 4A:4-4.8.5, which in no manner discriminated against plaintiff or biased him in the promotional decision-making process. (Pet. App. 24a).

The findings by the District Court also provide a basis to dismiss the Petitioner's assertion that "he was the most qualified for the position" and that the "mayor changed the hiring process just so that he did not have to promote the Petitioner, and, in fact, hired two other people who did not score as high as the Petitioner." (Pet. 6). In addition, these excerpts also evidence how incorrect and disingenuous the Petitioner's assertion is that the "mayor and the city officials refrained from making any hiring decisions until they could change the law just because of the Petitioner's political beliefs — that is, political discrimination and infringement upon First Amendment rights (freedom of speech)." (Pet. 6).[2]

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2. Oddly, it was the District Court, and not the Petitioner, that formed the Petitioner's section 1983 claim as being based upon the premise that Petitioner's First Amendment rights were violated when defendants conspired to retaliate against him for his mayoral campaign against Mayor Whelan. The court noted that to make out a section 1983 conspiracy claim, the plaintiff must make specific factual allegations of a combination, agreement, or understanding among all or between any of the defendants to plot, plan, or conspire to carry out the alleged chain of events in order to deprive plaintiff of a federally protected right. Significantly, the District Court noted that the plaintiff's brief completely failed to address this issue. (March 5, 1998 District Court Opinion, Pet. App. 11a).

The Petitioner simply disagrees with the factual findings of the courts below. Specifically, the District Court determined in its March 5, 1998 Opinion that:

> . . . plaintiff has failed to show that the adverse employment action he suffered was causally connected to his campaign comments. Plaintiff has produced no evidence to support his theory that his failure to be promoted was causally connected to his failed mayoral campaign. Without any evidence from which a jury could infer that he was not promoted because of his mayoral campaign . . . Plaintiff simply cannot survive summary judgment. (Pet. App. 28a).

These factual findings and application of the law by the lower courts does not provide the compelling reasons necessary to grant the petition. The Petitioner seems to have created an entirely new factual background for the case, and has ignored the actual facts disclosed in discovery and the determinations by the lower courts. For the same reasons, the Petitioner's assertion that he submitted evidence of "political discrimination from the onset" (Pet. 8) is also disingenuous, lacks factual support in the record and should be disregarded.

REASONS FOR DENYING THE WRIT

The petition's claim that the courts below abused their discretion in determining that the evidence submitted by the Petitioner did not support his claims of political discrimination under 42 U.S.C. § 1983 is not compelling and does not warrant review by this Court.

A. The burden of proof standard for First Amendment political discrimination claims is clear and settled.

The decision below was a plainly correct application of settled law and there has been no indication by the District Court, the Third Circuit or any other authority cited by the Petitioner, that the burden of proof standard associated with First Amendment political discrimination claims needs to be clarified. To make out a claim of discrimination based on political association, a public employee must prove: (1) that the employee works for a public agency in a position that does not require a political affiliation, (2) that the employee maintained an affiliation with a political party, and (3) that the employee's political affiliation was a substantial or motivating factor in the adverse employment decision. If the employee demonstrates these elements, the employer may avoid a finding of liability by demonstrating by a preponderance of the evidence that it would have made the same decision even in the absence of the protected affiliation. *Robertson v. Fiore*, 62 F.3d 596, 599 (3d Cir. 1995), *citing authority*, including *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 287, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977). The Petitioner has not placed before this Court any statements or findings by any courts indicating that there is uncertainty in weighing evidence, or in the application of burden-shifting mechanisms, in First Amendment political

discrimination cases. Frankly and plainly, the Petitioner does not like the applicable burden-shifting mechanism and wants a different one to apply in the hope that in someway his claim will survive. However, the Petitioner's argument has no basis in law, is not compelling and does not warrant review by this Court.

B. The *McDonnell-Douglas* pretext framework is inadequate with respect to First Amendment political discrimination claims.

The Petitioner has asserted that the burden of proof standard associated with political discrimination claims is "different from the *McDonnell-Douglas* discrimination test and also makes it easier for the defendant to escape liability." (Pet. 7). However, the *McDonnell-Douglas* pretext framework is inadequate when applied to the Petitioner's claim of political discrimination. Initially, the first element of four that a complainant in a Title VII matter must show to establish a prima facie case is that he or she belongs to a racial minority. Incorrectly, the Petitioner argues that he is able to prove this element of his prima facie case because he "was in the minority of not supporting the mayor for reelection." (Pet. 6). In addition, the fourth element that must be established for a prima facie case under the *McDonnell-Douglas* pretext framework requires the complainant to prove that after he was rejected, the position he was seeking remained open and the employer continued to seek applicants from persons of the complainants' qualifications. This also is inapplicable to the facts in this matter, which evidence that two other individuals on the promotion list with the Petitioner were eventually promoted to battalion chief (March 5, 1998 District Court Opinion, Pet. App. 8a).

A political discrimination case employs similar, though not identical, burden-shifting mechanisms as those used in other employment discrimination contexts, such as Title VII cases. *Stephens v. Kerrigan*, 122 F.3d 171, 176 (3d Cir. 1997). Under Title VII, a plaintiff must establish a prima facie case of employment discrimination, at which point a presumption of discrimination attaches to the plaintiff's claim. A limited burden of production then passes to the employer to articulate a legitimate, nondiscriminatory reason for its actions, a burden which is fully satisfied if the employer submits enough evidence to raise a genuine issue of material fact. The employer need not submit sufficient evidence to "persuade the [fact finder]." *Acevedo-Diaz v. Aponte*, 1 F.3d 62, 67 (3d Cir. 1993), *citing authority*. Notwithstanding the interim shift in the burden of production to the employer, the plaintiff-employee in a Title VII case "retains the burden of persuasion" at all times. *Id.*

By contrast, under the *Mt. Healthy* burden-shifting mechanism applicable to a First Amendment political discrimination claim, the burden of persuasion itself passes to the defendant-employer once the Plaintiff produces sufficient evidence from which the fact finder reasonably can infer that the Plaintiff's protected conduct was a "substantial" or "motivating" factor behind his dismissal or adverse employment action. Once the burden of persuasion shifts to the defendant-employer, the plaintiff-employee will prevail unless the fact finder concludes that the Defendant has produced enough evidence to establish (by a preponderance) that the plaintiff's dismissal would have occurred in any event for nondiscriminatory reasons. *Acevedo-Diaz v. Aponte*, at 67.

The Petitioner incorrectly argues that "this shift of burden of proof [in political discrimination cases] is different from the *McDonnell-Douglas* discrimination test and also makes it easier for the defendant to escape liability." (Pet. 7). The Petitioner ignores that under Title VII the employer has only a limited burden of production to articulate a legitimate, nondiscriminatory reason for its actions. By contrast, under the burden-shifting mechanisms applicable to a First Amendment political discrimination claim, once the burden of persuasion shifts to the defendant-employer, the plaintiff-employee will prevail unless the fact finder concludes that the defendant-employer has proved by a preponderance of the evidence that the plaintiff's dismissal would have occurred in any event for nondiscriminatory reasons. This is a much more difficult burden for the defendant-employer.

The Petitioner also ignores that under Title VII, upon an employer articulating a legitimate and nondiscriminatory reason for its actions, a burden which is fully satisfied if the employer submits enough evidence to raise a genuine issue of material fact, the presumption of discrimination drops and the plaintiff must then offer evidence tending to show that the defendant's explanation is a pretext for discrimination. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802-804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). As articulated in *Acevedo-Diaz v. Aponte*, at 67, the plaintiff-employee in a Title VII case "retains the burden of persuasion" at all times, and, by contrast, the burden of persuasion in a First Amendment political discrimination claim passes to the defendant employer once the plaintiff produces sufficient evidence. Clearly, it is more difficult for a plaintiff to prove liability in a Title VII case, with the *McDonnell-Douglas* burden-shifting mechanism, than in a First Amendment political discrimination case.

The Petitioner also argues that this Court "must extend and compare the age discrimination analysis to political discrimination." (Pet. 8). However, the framework to establish discrimination under the Age Discrimination in Employment Act, 29 U.S.C.A. §§ 621-624 (West 1985 and Supp. 1994) is inadequate when applied to the Petitioner's allegations in this matter. *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777-78 (3d Cir. 1994).

CONCLUSION

For the reasons given above, and to avoid repetition, for those reasons given in Respondent's James Whelan's, Paul Gallagher's and Benjamin Brenner's Briefs in opposition in this matter, the petition should be denied.

Respectfully submitted,

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